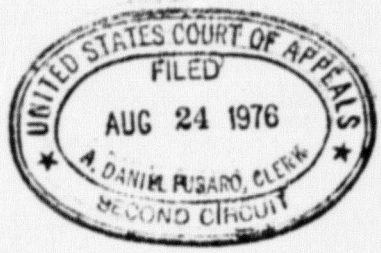
United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

76-7356

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT



No. 76-7356

In Re: Master Key Antitrust Litigation

B

On Appeal From the United States District Court
For the District of Connecticut

BRIEF OF DEFENDANT-APPELLEE
ILCO CORPORATION

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STATEMENT OF ISSUES

I. DID THE DISTRICT COURT ABUSE ITS DISCRETION IN FINDING, ON THE BASIS OF ITS KNOWLEDGE OF THE CASE, THE VOLUMINOUS RECORD AND ALL THE SUPPORTING EVIDENCE, THAT THE SETTLEMENT BETWEEN PLAINTIFFS AND DEFENDANT ILCO CORPORATION IS FAIR, REASONABLE AND ADEQUATE?

STATEMENT OF THE CASE

This is an appeal by Exxon Corporation and eight of Exxon's affiliated companies from the approval of the settlement by Ilco Corporation of multi district private antitrust class actions. Exxon has also appealed the District Court's approval of the settlement between plaintiffs and defendant Emhart Corporation, and the two appeals have been consolidated. In the Ilco appeal, Exxon has challenged the adequacy of the amount of the settlement, while in the Emhart appeal Exxon has challeneged only the allocation of the settlement fund between the public body and private entity classes.

STATEMENT OF FACTS

I. The Background of the Litigation

Ilco Corporation ("Ilco") adopts the statement of facts presented by defendant Emhart Corporation in its brief with respect to the description of the background of the litigation, except in one particular respect. The government suit against Ilco was terminated by consent decree entered October 6, 1969. United States v. Ilco Corp., 1969 Trade Cases Para. 72,904 (D.Conn. 1969).

II. The Role of Ilco Corporation in the Industry and in this Litigation.

The fairness of the Ilco settlement must be measured in the perspective of Ilco's role in the builders hardware industry and in the conduct of the present litigation. Ilco's present posture reflects its inability to fund the legal expenses necessary to defend this kind of massive, complex litigation, an inability which itself reflects Ilco's poor history in the builders hardware industry. As indicated in plaintiff's Memorandum in Support of Settlement with Emhart Corporation (A.523), Emhart's sales of contract hardware during the four-year period 1965 through 1968 totalled $93,908,018. Sales figures furnished to plaintiffs in response to a request for the production of documents

indicate that for the same four-year period Ilco's total sales of contract hardware amounted to $16,138,000. It is not surprising that Judge Blumenfeld, at the January 27, 1975 hearing on defendants' motion for denial of class certification and plaintiffs' motion to separate liability and damage issues, asked the question, "What's the minnow doing here among these barracudas?" (A. 259). Indeed, even among contract hardware distributors, alleged as co-conspirators to be under the thumb of the respective manufacturers, Lockwood (the former contract hardware division of Ilco) ". . . really always has been sort of a dog." (Deposition of Robert H. Witt taken April 2, 1973, Page 77).

Continuing a trend which began in 1964, Ilco's sales of contract hardware declined from 1968 to 1972 when such sales amounted to slightly more than $2,000,000. At that time Ilco Corporation was acquired by its now present owner Unican Security Systems, Ltd., a Canadian corporation. Financial statements furnished to plaintiffs indicate that during that same period of time Ilco suffered losses in 1968 of $630,000, in 1969 of $745,000, in 1970 of $630,000, in 1971, of $1,700,000, showing a gain in 1972 only because of the forgiveness of an indebtedness of $1,900,000. Although there were slight earnings in 1973 and 1974, when Ilco disposed of certain subsidiaries, Ilco suffered a loss in 1975 in the amount of $2,270,000, and experienced an accumulated deficit in the amount of $3,000,000. (A. 977).

On January 27, 1975 at the hearing on class certification and bifurcation of liability and damage issues, counsel for Ilco advised Judge Blumenfeld that the company's financial condition was such that Ilco could no longer afford the cost of defending itself in the litigation (A. 261-262). Shortly thereafter Ilco ceased an active defense of the case and neither initiated, participated in nor responded to any of the ongoing discovery procedures and trial preparation. Ilco's only activity in the litigation since that time has been the negotiation of the settlement now being attacked.

III. The Ilco Settlement.

In February of 1976, counsel for Ilco entered into settlement negotiations with counsel for plaintiffs, those discussions culminating in an agreement in principle in May of 1976 that Ilco would pay the amount of $85,000. At the settlement conference held in the chambers of Judge Blumenfeld on May 21, 1976 (A. 613-646), attended by counsel for Ilco and non-settling defendants Sargent & Company and Eaton Corporation and co-liaison counsel for plaintiffs, it was agreed that notice of the Ilco settlement should be given by publication in all regional editions of the Wall Street Journal and by sending individual notice to all counsel who had filed appearances on behalf of any plaintiff or class members and to all

class members who had filed requests to be kept informed of the status of the proceedings as a result of having received the notice of class action and partial settlement sent in connection with the Emhart settlement. The Notice of Partial Settlement was duly sent and published on June 15, 1976 (A. 602,652) in accordance with the District Court's order dated June 11, 1976 (A. 648). A hearing on the fairness of the Ilco settlement was held on June 28, 1976 before Judge Blumenfeld, at which time the Ilco settlement agreement was approved in open court (A. 1006). Appellant Exxon Corporation, which appeared at and participated in that hearing, has appealed from the Order of Approval of Settlement and Final Judgment of Dismissal of Ilco Corporation with Prejudice dated July 12, 1976 (A. 1015).

SUMMARY OF ARGUMENT

Exxon Corporation has appealed from an order of Judge Blumenfeld of the United States District Court of the District of Connecticut approving the settlement agreement between all plaintiffs and defendant Ilco Corporation and dismissing the actions as to Ilco Corporation with prejudice. Of the 308 counsel and class members who received individual notice of the Ilco settlement and of the uncounted number who received notice by publication in the Wall Street Journal, only Exxon Corporation questions the fairness or sufficiency of the settlement amount. Likewise, it is only Exxon, out of some 40,000 class members, who objects to the Emhart settlement.

A determination by a district court that a settlement is fair and adequate may only be disturbed upon a showing of abuse of discretion by that court. In the present case, the Court below considered all relevant factors in making a determination that the settlement amount was fair and adequate under the circumstances. Such factors included the Court's familiarity with the case and all the parties, the experience of counsel, the stage of the proceedings, the amount of discovery completed, the complexity and expense of the litigation, the reaction of the class to the settlement, the general risks of litigation, and, most important, the financial inability of Ilco to pay a greater amount or withstand a greater judgment. The Court's determination of the fairness

of the settlement amount was supported by affidavit and by audited financial statements which had been made available to counsel for plaintiffs and which had been analyzed by them. Such information was also available to Exxon Corporation, yet at the hearing Exxon failed to produce any evidence indicating that the settlement was not well founded.

The judgment of the District Court should be affirmed.

ARGUMENT

I. A Determination of a District Court that a Class Action Settlement is Fair and Adequate May Only be Disturbed Upon a Clear Showing by Objectors that the District Court has Abused its Discretion.

It is well-recognized in this circuit and others that a district court's approval of a class action settlement may only be disturbed upon a clear showing that the district court abused its discretion. City of Detroit v. Grinnell Corp., 495 F.2d 448 (2nd Cir. 1974); Grunin v. The International House of Pancakes, 513 F.2d 114 (8th Cir. 1975); United States v. Allegheny - Ludlum Industries, Inc., 517 F. 2d 822 (5th Cir. 1975); Flinn v. F.M.C. Corp., 528 F. 2d 1169 (4th Cir. 1975).

As this Court said in City of Detroit v. Grinnell Corp., supra:

> As we evaluate the settlement approved in this case, the Court must remain mindful that:
>
> > Great weight is accorded his [the trial judge's] views because he is exposed to the litigants, and their strategies, positions and proofs. He is aware of the expense and possible legal bars to success. Simply stated, he is on the firing line and can evaluate the action accordingly.
>
> Ace Heating & Plumbing Co., Inc. v. Crane Company, 453 F. 2d 20, 34 (2d Cir. 1971).

> In fact, so much respect is accorded the opinion of the trial court in these matters that this Court will intervene in a judicially approved settlement of a class action only when the objectors to that settlement have made a clear showing that the District Court has abused its discretion (citations omitted). 495 F. 2d at 454.

Of all the factors which a district judge might weigh in considering the fairness of a settlement[1/], the factors which seem most pertinent to the settlement by a defendant in the unique position of Ilco include the familiarity of the court with the litigation and the parties; the financial condition of the defendant and its ability either to pay a greater amount in settlement or to withstand a greater judgment; the sufficiency of the record upon which the judge made his determination and, conversely, the lack of contrary evidence in the record; the reaction of the class to the settlement; and the risk of establishing liability. While plaintiffs point out in their Memorandum in Support of the Proposed Settlement with Ilco Corporation that on a transaction basis comparable to the Emhart settlement Ilco should pay approximately $950,000 (A. 919), it should be pointed out that this Court has said,

> The fact that a proposed settlement may only amount to a fraction of the potential recovery does not, in and of itself, mean that the proposed settlement is grossly

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1/ See City of Detroit v. Grinnell Corp., supra, 495 F.2d at 463.

inadequate and should be disapproved. City of Detroit v. Grinnell Corporation, supra, 495 F. 2d at 455.

Accord, Flinn v. F.M.C. Corp., supra, 528 F.2d at 1173-1174.

With regard to the factor of the strength of the plaintiffs' claims and the risk of proving liability as well as damages, Ilco and Emhart are in identical positions, and Ilco adopts the arguments made by Emhart in Section IV of its brief.

II. The District Court is in the Best Position to Determine the Fairness of the Settlement.

The trial judge is in the best position to determine the fairness of the settlement because, as has been stated, ". . .he is on the firing line and can evaluate the action accordingly." Ace Heating and Plumbing Co. Inc. v. Crane Company, supra, 453 F. 2d at 34. The trial judge has experienced the expense, complexity and difficulty of the litigation, is knowledgeable as to the amount of discovery completed and is sensitive to the difficulties of proof both sides face. He knows whether he has been dealing with experienced trial counsel who are making considered judgments on the basis of that experience. In the present case, Judge Blumenfeld has shepherded the Master Key Antitrust Litigation from its very beginning to the present time. Indeed, he also was the judge in the government suits against the same defendants before any private litigation was

filed. He has refereed numerous disputes about discovery matters, he has had numerous conferences to stay abreast of developments in the case and he has watched as Ilco's participation in this litigation has become less and less visible. He has heard the theories of plaintiffs and defendants expounded time and again.

In Flinn, supra, a case brought under Title VII of the Civil Rights Act of 1964 but in which the court of appeals drew heavily on the considerations of this Court in Grinnell in determining the adequacy of the settlement, the court said:

> In reviewing the record and evaluating the strength of the case, the trial court should consider the extent of the discovery that has taken place, the stage of the proceedings, the want of collusion in the settlement, and the experience of counsel who may have represented the plaintiffs in the negotiation. The fact that all discovery has been completed and the cause is ready for trial is important, since it ordinarily assures that sufficient development of the facts to permit a reasonable judgment on the possible merits of the case . . . . While the opinion and recommendation of experienced counsel is not to be blindly followed by the trial court, such opinion should be given weight in evaluating the proposed settlement. 528 F.2d at 1173.

It is not the province of the reviewing court to substitute its ideas of fairness for those of the trial judge. It should act only upon a clear showing that the district court abused its discretion in approving the settlement. Ilco submits that the familiarity of the trial judge with the case as

a whole is a significant factor to be considered by the appellate court in judging whether the trial court did in fact abuse its discretion.

III. The Fact that There is Only One Objector to the Settlement Belies the Claim that it is Unfair to the Class Members as a Whole.

It should be kept in mind that the settlement was agreed to by counsel representing all plaintiffs, including sixteen states, the City of New York, the City of Philadelphia as plaintiff and representative of the national class of public entities and Amherst Leasing Corporation as plaintiff and representative of the national class of private builder-owners. There are no non-settling plaintiffs. Only Exxon, of all the counsel and class members who received individual or published notice of the Ilco settlement, now objects to its fairness. Exxon misleads when it repeatedly states, for example, at pages 31 and 37 of its brief, that the opposition of objecting "class members" indicates the necessity for further review of both the Emhart and Ilco settlements. It should be kept in mind that of the more than 40,000 class members, only one - Exxon - opposes either settlement.

As this Court stated in Grinnell,

> Any claim by appellants that the settlement offer is grossly and unreasonably inadequate

> is belied by the fact that, from all appearances, the vast preponderance of the class members willingly approved the offer. And, the favorable reception of the settlement offer at the hands of both plaintiffs and the individual attorneys should have had little or nothing to do with the negotiation of the settlement is strong evidence that the District Court not only failed to abuse its discretion in approving the settlement but fulfilled its obligation in exemplary fashion. 495 F.2d at 462.

As the court stated in Flinn, "The attitude of the members of the class, as expressed directly or by failure to object, after notice, to the settlement, is an appropriate consideration for the trial court . . . " Flinn v. F.M.C. Corporation, supra, 528 F.2d at 1173.

See Grunin v. International House of Pancakes, supra, 513 F. 2d at 120 n.6 and 124.

While one might reasonably assume that the general knowledge of Ilco's precarious financial condition and withdrawal from the builders hardware industry accounts for the lack of objection, Exxon appears to contend, at page 42 of its brief, that the lack of objection to the Ilco settlement was the result of inadequate notice rather than the conclusion by class members that the settlement is fair. Yet not only did Exxon not object to either the form or adequacy of the notice at the June 28 fairness hearing,[2/] but it is apparent that

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2/ In this regard the comments of the court in Grunin are noteworthy: "Finally we note with regard to each of the due process claims considered above that they were raised for the first time in this court despite the fact that counsel

Exxon's major concern is that the Ilco settlement provides that the settlement funds will be used to defray common litigation expenses incurred by plaintiffs and that this "unsavory provision" (Exxon Brief, page 42) is merely a vehicle for the payment of legal fees of plaintiffs' liaison counsel.[3/]

2/ (continued) for appellant Grunin appeared at the November settlement hearing before the district court. If the counsel had brought these objections to the attention of the court at that time or had sought a continuance, the expressed need for appellate relief on these grounds might well have been eliminated." 513 F.2d at 122-123.

3/ It should be clear that Judge Blumenfeld emphatically ruled out such a possibility at the June 28, 1976 hearing on the Ilco settlement:

> Mr. King: . . . This provision makes the settlement proceeds from Ilco, in a sense, the private domain of plaintiffs' counsel. I think that is wholly inappropriate.
>
> I have no objection to plaintiffs' counsel applying for an award of expenses from the Court.
>
> The Court: Well, they're not going to use it unless they make an application.
>
> Mr. King: I appreciate that.
>
> * * *
>
> The Court: They're going into the same fund and earn the same kind of interest that the escrow fund made up of Emhart's settlement is making. And if they want to use that money for expenses they are going to have to make an application to the Court (A.994, 995).

Contrary to Exxon's contention that the notice given was "cursory" and inadequate, it is clear from the record that the adequacy of the notice was a primary consideration of the District Court. The matter of notice of the Ilco settlement was the primary focus of concern of the Court, both co-liaison counsel for plaintiffs and counsel for Ilco at the May 21, 1976 conference in chambers and indeed consumed more than 20 of the 30 transcript pages of that conference (A. 623-645). It was the considered judgment of the District Court and counsel, given the relatively small size of the settlement and the disproportionate cost of extensive notice, that the most practicable form of notice was individual notice to those counsel or class members who had either filed appearances or requests to be kept informed of the status of the litigation as a result of having already received notice pursuant to Rule 23(c)(2) of the pendency of the class action and Emhart settlement and notice by publication in all regional editions of the Wall Street Journal. It should also be kept in mind that the form of notice was agreed to by Mr. Freeman and Mr. Montague, class representatives for both the public and private classes.

Rule 23(e) of the Federal Rules of Civil Procedures, governing the dismissal or compromise of class actions, requires that "notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs."

(Emphasis added). While Ilco agrees that due process requires that notice of a proposed settlement be given to the class, Ilco does not agree, as Exxon apparently contends, that notice under Rule 23(e), in contrast with notice of the class action required under Rule 23(c)(2) with which the Supreme Court was concerned in Eisen v. Carlisle & Jaquelin, 417 U.S. 156(1974), must be sent to all class members whose names and addresses may be ascertained through reasonable effort. It is clear that the Supreme Court felt itself constrained by the very clear language of Rule 23(c)(2) [4/] that individual notice was required: "We think the import of this language is unmistakable." 417 U.S. at 173.

In Grunin v. International House of Pancakes, supra, the court took note of the distinction between Rule 23(e) and Rule 23(c)(2):

> However, Rule 23(e) provides that notice be

4/ "In any class action maintained under subdivision (b)(3), the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice shall advise each member that (A) the court will exclude him from the class if he so requests by a specified date; (B) the judgment, whether favorable or not, will include all members who do not request exclusion; and (C) any member who does not request exclusion may, if he desires, enter an appearance through his counsel."

> given "in such manner as the court directs." Thus, the mechanics of the notice process are left to the discretion of the court subject only to the broad "reasonableness" standards imposed by due process. (Citations omitted). 513 F.2d at 121.

The court referred to the reasonableness standard articulated by the Supreme Court in Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314, 70 S.Ct.652, 657, 94 L.Ed.865,873 (1950), that the notice given must be "reasonably calculated, under all of the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." It seems obvious that the best way to give notice to interested parties is to give notice to those parties who have already expressed such interest by responding to the notice of the pendency of the class action and to notice of a settlement of much greater dimensions than the Ilco settlement. Indeed,even the court in Girsh v. Jepson, 521 F.2d 153 (3rd Cir. 1975), a case cited by Exxon, which Ilco contends misapprehended the import of the Supreme Court in Eisen with respect to the requirement of notice under Rule 23(c)(2) in contrast to Rule 23(e), said, "We do not mean to indicate that individual notice must be given in all cases." 521 F.2d at 153 n. 12.

Exxon itself misapprehends the distinction between the requirements of Rule 23 (c)(2) and Rule 23(e) when it points out in its brief that "unlike the individual notice of the Emhart settlement which was mailed to 18,000 members

of the private builder-owner class alone (A.511-A.512), partial notice of the Ilco settlement was sent to only 180 private-entity class members (A.888)." (Exxon Brief, page 10, original emphasis). But Exxon fails to note that the so-called Emhart notice (A.399-400) not only was the settlement notice required by Rule 23(e) but was also the notice of class action required by Rule 23(c)(2) to be sent to all class members whose names and addresses are ascertainable. It should be no surprise that individual notice of the Ilco settlement would be sent to a much smaller number of class members in the light of the size of the settlement, the expense of larger notice and the limited response of class members to the class action notice.

To the extent that Exxon contends that the content of the Ilco notice was inadequate, it has been said that "class members are not expected to rely upon the notices as a complete source of settlement information." Grunin, 513 F.2d at 122.

It is clear that the District Court complied with Rule 23(e), with due process requirements and with common sense in approving and ordering the notice of the Ilco settlement.

IV. The Poor Financial Condition of Defendant is a Proper Factor for the Court to Consider in Determining the Fairness of a Settlement.

Exxon does not appear to challenge the proposition that a defendant's poor financial condition or inability to pay a litigated judgment justifies the approval of a small settlement amount. At the hearing on the Ilco settlement agreement the following colloquy took place between the Court and counsel for Exxon:

> The Court: Mr. King, if that's all they can pay, is it a fair settlement?
>
> Mr. King: If it's all they can pay, your honor, I think I would have no objection. (A. 1003).

Indeed it is well established that a defendant's inability to pay is a proper consideration for the trial court. City of Detroit v. Grinnell Corporation, supra; Grunin v. International House of Pancakes, supra; In re National Student Marketing Litigation, 68 F.R.D. 151 (DDC 1974).

In Grinnell this Court, echoing the thinking of the United States Supreme Court in Protective Committee v. Anderson, 5/ 390 U.S. 414 (1968), stated, "Common sense seems to dictate the necessity, to say nothing of the propriety, of such a consideration." 495 F. 2d at 467.

In Grunin the court also considered the defendant's finan-

5/ There the Supreme Court notes, "Further, the judge should form an educated estimate of the complexity, expense and likely duration of such litigation, the possible difficulty of collecting on any judgment which might be obtained, and all other factors relevant to a full and fair assessment of the wisdom of the proposed compromise." 390 U.S. at 424-425 (Emphasis added).

cial stability in considering whether to approve the proposed settlement:

> There is evidence to suggest that a total victory, including a voiding of the equipment leases and an award of damages, would have been financially disastrous if not fatal to IHOP. Nevertheless, the district court in rejecting the first settlement proposal indicated that some revision in the equipment lease was essential. Given the court's directive and IHOP's cash flow difficulties, the parties worked out a settlement which gave valuable concessions to the franchisees yet maintained IHOP's corporate viability. 513 F. 2d at 125 (Emphasis added).

In National Student Marketing, supra, the court, in approving the settlement, recognized that the primary motivation to settle was the uncertain financial condition of the defendant. Indeed, the court noted, "From the company's standpoint the settlement has been termed an economic necessity, the approval of which will hopefully remove a major road block from its attempt at financial recovery." 68 F.R.D. at 156. The court also notes that the plaintiffs were ". . . cognizant that too large a recovery after trial might drive NSMC into bankruptcy, converting any fought for judgment into a mere Pyrrhic victory." Id.

It has been no secret from the participants in the present litigation that a judgment against Ilco Corporation will drive it into bankruptcy. It is also no secret that the dismissal of Ilco from this litigation will have absolutely no

effect on the collectibility in full of any judgment entered against the two remaining substantial defendants, Eaton Corporation and Sargent & Company. Protection of the class members, not corporate capital punishment, should be the primary aim in considering the approval of class action settlements. To paraphrase Judge Blumenfeld, throwing back a minnow will still leave the barracudas on the hook.

V. The Entire Record Before the District Court Supports the Conclusion that the Ilco Settlement is Fair and Adequate.

The record of this litigation belies the claim by Exxon that the District Court approved the settlement "having no record before it." (Exxon Brief, page 13). At the conference in chambers on May 21, 1976, the court acknowledged its familiarity with the condition of Ilco and pointed out that Ilco's claims in this regard have long been open to scrutiny by counsel:

> The Court: As far as the Court is concerned, your representation here today submitted in support of the motion and supported by both of some affiants or more than one, together with a similar affidavit from certain persons selected by Mr. Freeman, would satisfy the Court.
>
> This hasn't just happened between yesterday and today.
>
> I know that.
>
> Mr. Donelan: Yes sir.

> The Court: You've been protecting the situation of your company since the inception of this case. So this has been an ongoing and open situation that you've made available for examination.
>
> Mr. Donelan: Yes sir.
>
> The Court: So I'm not worried about that as far as the Court's approval is concerned. (A. 635-636).

Exxon claims that the record is "wholly inadequate" and "wholly incomplete" for either the trial court, plaintiffs' liaison counsel, objectors or this Court to make an informed judgment as to the fairness of the Ilco settlement. Exxon further claims that "the District Court accepted the unsupported statements of counsel sponsoring the settlement as a sufficient basis for approval." (Exxon Brief, page 15). Yet Exxon, having had adequate notice of the hearing, failed to present <u>any</u> evidence at the fairness hearing to support its objections other than the Ilco financial statements referred to as Objector's Group Exhibit 1 (A. 758-817) which had been furnished by Ilco to plaintiffs' liaison counsel many weeks before. In fact the only "evidence" Exxon had even intended to present was the testimony of Mr. Montague, plaintiffs' co-liaison counsel, the same individual Exxon now criticizes the District Court for having listened to. Mr. Montague and Mr. Freeman, it should be pointed out, had already explained to

the trial court at the conference on May 21st the basis upon which they accepted the Ilco settlement. Counsel for Exxon did not attempt to submit any other "evidence" to the Court and misrepresents the action of the District Court at that hearing when it says that "the District Court foreclosed the development of an evidentiary record on the critical issues raised by Ilco's own financial statements." (Exxon Brief, page 18). The record of that hearing, which is quoted incompletely and out of context in Exxon's brief, makes it clear that counsel for Exxon was invited to present whatever evidence he had:

> Mr. King: * * * So may I make the formal motion to present evidence here by calling Mr. Montague as a witness?
>
> The Court: No sir, you may not call Mr. Montague as a witness.
>
> If you have some evidence that you brought here, you may present it. (A.993, emphasis added).

The only evidence presented or offered by Mr. King was the Ilco financial statements which had previously been furnished to co-liaison counsel for plaintiffs. It is less than forthright for Exxon to imply to this Court that the District Court "foreclosed" Exxon from presenting evidence.

Indeed, Exxon made no inquiry at all at any time of counsel for Ilco with regard to the financial statements which Exxon now claims constitutes evidence as to the unfairness of the

settlement. It is not, as Exxon would have this Court believe, because of any lack of opportunity to inspect relevant materials that Exxon presented no evidence at the fairness hearing. The record indicates that the appearances of Mr. King and William Simon, his co-counsel, were filed on May 14, 1976. Nor can Exxon legitimately claim that it had no knowledge of the financial condition of Ilco or that Ilco was engaged in settlement discussions. In Emhart's Memorandum in Support of the Proposed Settlement of Emhart Corporation (A. 541 - A.570), comment is made that "defendant Ilco is sui generis because it is virtually without funds. At the present time it is in the process of closing down its contract hardware operations completely." (A. 552). A copy of the proposed Ilco settlement agreement was mailed to Judge Blumenfeld on May 27, 1976 by co-liaison counsel for plaintiffs and was docketed on June 10, 1976 (A. 18).

The fact of Ilco's financial condition and that it had terminated its contract hardware operations was well known both in the context of the litigation and in the context of the industry. In fact, the consolidated financial statements of Ilco's parent, Unican Security Systems, Ltd., which Exxon cites despite the fact that they are not a part of the record on appeal, indicates for the period ending June 10, 1975 that

> a 4 1/2 month strike called by Local 290 of the IUE combined with summer vacations and a

> slow restart of the plant resulted in virtually six months of no production at Ilco. This was followed by a management decision to phase out the architectural hardware and lock division known in the industry as Lockwood.[6]

It is surprising that Ilco's financial condition should be of such sudden and startling concern to such active antitrust class action attorneys as Mr. King of the well-known antitrust firm of Howrey & Simon and Samuel H. Seymour, who entered an appearance on behalf of members of the private builder-owner class at the June 2, 1976 Emhart hearing and said:

> We have followed the progress of these proceedings with particular interest, not only because of our representation of a very substantial segment of this class, but because we are counsel for the same class in the Gypsum antitrust litigation before Judge Zirpoli in San Francisco, where we have just concluded the settlement administration; and in the plywood antitrust litigation before Judge Cassibry in New Orleans, where we have just got nationwide classes certified.
>
> We are aware of the fact that this proceeding has been handled in a model fashion - not only because of your Honor's handling of the case, but because of the competence of plaintiffs' liaison counsel, who are well known to us in other litigation as well. (A.690-691).[7]

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[6] Consolidated Financial Statements, June 30, 1975, Unican Security Systems, Ltd., Page 2.

[7] By order dated August 11, 1976, Mr.Seymour was appointed to a committee of counsel for purposes of allocation and distribution of recoveries on behalf of the private plaintiff class. (A.1028). Coincidentally, Mr. Seymour has pressed no objections to either the Emhart or the Ilco settlements on appeal.

Yet at no time prior to the hearing did Exxon initiate any discovery with respect to the settlement. Nor did Exxon contact counsel for Ilco inquiring as to the financial statements or requesting to speak with any officers of Ilco or its accountants. Exxon understandably makes no reference to its failure to consider the enormous record of this litigation or to its failure to prepare adequately for the hearing, the doing of which would have obviated the necessity for this appeal.

None of the cases cited by Exxon at pages 32-36 of its brief mandates this Court's ruling that the District Court abused its discretion in approving the Ilco settlement on the record before it. In fact,all of the cases are clearly distinguishable. In Cohen v. Young, 127 F.2d 721 (6th Cir. 1942), the district court's approval of the settlement was reversed because it had been approved "upon the sole ground that it was recommended by the attorneys of record" (emphasis added) and because "neither Young's statement as to his alleged insolvency nor the auditor's report upon which the consent to the compromise . . . was based, was introduced in evidence, nor included in the record." 127 F.2d at 724. That case was not remanded for the introduction of "further" evidence, as Exxon says, but for the introduction of any evidence. Contrary to Young, where the appellate court found that the district court "did not rely upon nor mention the

statement of Young relating to his insolvency nor the auditors' report prepared in reference thereto," 127 F. 2d at 725 - and this for the simple and obvious reason that those materials had not been introduced in evidence and were not part of the record - in the present case it is clear that the court below both had the relevant information before it, before and at the hearing, and relied upon it in approving the settlement.

In Greenfield v. Villager Industries, Inc., 483 F. 2d 824 (3rd Cir. 1973), the settlement approval was vacated because the court found the notice, which was a combined notice of class action and settlement, to be "fatally defective" and because there was no hearing at all on the merits of the settlement, the district court having denied motions for extensions of time to file proofs of claim and objections to the proposed settlement.

In Saylor v. Lindsley, 456 F. 2d 896 (2nd Cir. 1972), this Court was concerned not with the proposed settlement per se but with whether there had been sufficient discovery of facts and development of the case on the merits to enable either the objector or the court, in assessing the settlement, to apprise themselves "of all facts necessary for an intelligent and objective opinion of the probabilities of ultimate success should the claim be litigated (citation omitted)." 456 F.2d at 904 (Emphasis added). The Court con-

cluded that the district court was not in such a position and remanded the case for further discovery "into the merits of the action." Id. Saylor is not even faintly similar to the present litigation, where the pre-trial discovery is of gigantic proportions and the theories and facts of liability and defense are well known to both sides. In addition, in Saylor the stipulation of settlement was entered into by the plaintiffs' attorney without his client's authorization, and at the hearing on the settlement the plaintiff appeared through new counsel in opposition to the settlement. Exxon's reliance on Saylor is utterly misplaced.

In Girsh v. Jepson, 521 F.2d 153 (3rd Cir. 1975), the district court's approval of a settlement was disturbed because the court of appeals found that the opportunity of the objector to develop a record was denied "by the totality of the circumstances surrrounding the settlement hearing." 521 F.2d at 157. The circumstances of that case are simply not present here. First, that action was commenced in October 1972, and the stipulation of settlement was filed in November, 1973, a period of only slightly more than a year, with the result that, in the words of the objector, ". . . the Court file is so sparse to pre-trial discovery that an evaluation of claims is difficult at best and probably impossible . . .." 521 F.2d at 156 n.5. Second, the objector had filed a motion

to continue the date set for the settlement hearing, which was denied. Third, and the factor that most distinguishes the objector in Girsh from Exxon, the objector vigorously sought discovery regarding the settlement and was denied. She filed four sets of interrogatories to two defendants and to plaintiffs' counsel. The interrogatories were never answwered, and the objector's motion to compel answers was denied by the district court. The court of appeals said:

> On her part, Frackman [the objector] made repeated efforts, through timely filed motions, to obtain answers to her interrogatories and to continue the date of the settlement hearing. In our view, from the time objector Frackman became actively involved in this case, she did everything within her power to prepare for the settlement hearing. Nevertheless, the actions of the district court and her adversaries combined to deny her meaningful participation in that hearing.. 521 F.2d at 158.

The same simply cannot be said of Exxon. In addition, the district court in the present case had before it, besides six years of experience with the litigation, sufficient financial information to approve intelligently the settlement.

Newman v. Stein, 464 F.2d 689 (2nd Cir. 1972), likewise does not support Exxon's contention. Indeed, Newman would be better cited in support of the approval of the settlement, for in that case this Court upheld a settlement of only one-

seventh of the amount the objectors claimed was assuredly recoverable. The Court held that the settlement in this amount did not fall below that range of reasonableness - "a range which recognizes the uncertainties of law and fact in any particular case and the concomitant risks and costs necessarily inherent taking any litigation to completion," 464 F.2d at 693 - by which an appellate court will judge the discretion used by the trial court in approving a settlement. Exxon correctly points out that the settlement in Newman occurred after the completion of a full trial and neither objector complained that the trial court prevented the development of any further facts relevant to the settlement. It perhaps need not be pointed out to this Court that the language quoted and characterized by Exxon as "this Circuit's policy governing disposition of these appeals" (Exxon Brief, page 34) was part of a recitation of the many factors included in approval of a settlement and in fact referred to cases decided by other circuits, the citations to which Exxon omitted.

In Percodani v. Riker-Maxson Corporation, 50 F.R.D. 473 (S.D.N.Y. 1970), it is clear that the reason the court did not approve the settlement was because it felt that ". . . greater success for the plaintiffs than that offered by the proposed compromise appears quite possible." 50 F.R.D. at 478. The court said, "Perhaps the most basic reason why the proposed

settlement is not fair lies in the strength of plaintiff's claims against defendants . . . there appears to be considerable merit to them." 50 F.R.D. at 477-478. The court in Percodani distinguished other cases where settlements had been approved "where the plaintiff's argument for recovery was not so compelling," 50 F.R.D. 478, and similarly that case may be easily distinguished from the present case where the probabilities of success by the plaintiffs are far from certain.

Exxon also misapprehends the thrust of the decision in Fricke v. Daylin, Inc., 66 F.R.D. 90, (E.D.N.Y. 1975). While the court did say that the "conclusory affidavits" of the defendants "fail to satisfy the court that men of their position in Daylin and presumed financial standing are incapable of satisfying a judgment to any extent, if one should be rendered against them," the court went on to say that "the question is not whether they are or will be financially responsible in that event but whether any real consideration is passing to Daylin in exchange for the dismissal with prejudice of this suit." 66 F.R.D. at 98 (Emphasis added). Exxon erroneously characterizes this decision as being founded on the district court's having "decided that the opponents had not met their burden of applying sufficient evidentiary facts on which approval could be based." (Exxon Brief, page 35-36). The following language clearly articulates the basis for the court's disapproval of the proposed settlement:

> But this is not the ordinary case; indeed it strikes the court as most extraordinary. Here, there is no "amount offered in settlement" - only the "consent" of interested defendant directors and officers to free for corporate use in time of need assets which the corporation already equitably owns.
>
> In the court's judgment the proponents have wholly failed to demonstrate that their proposed settlement is in the best interests of the corporation and its stockholders. On the facts made available, it would appear that Daylin is being asked to relinquish meritorious causes of action for waste and breach of fiduciary duty . . . without visible consideration passing to the corporation. 66 F.R.D. at 97-98.
>
> * * *
>
> . . . In the court's view the consideration is all going the other way and the settlement in its present form is not in the best interest of Daylin or its stockholders. 66 F.R.D. at 98-99.

In Weiss v. Chalker, 55 F.R.D. 168 (S.D.N.Y. 1972), as in Saylor and Percodani, supra, the court was concerned with the extent of discovery going to the merits of the plaintiffs' claims in the light of "the present state of the law and the factual questions that must be answered before the limits of a fair settlement can be staked out adequately." 55 F.R.D. at 170. It was "fundamental matters" bearing on liability which were "disturbing" to the court in that case. The court noted that "the deposition evidence is scant and unsatisfactory; the documentary material is surface stuff," and quoted the words of Chief Judge Friendly in Saylor v. Lindsley, supra, that "there had been no attempt to find the kind of inculpatory

correspondence that so often reposes in corporate files [citation omitted]."55 F.R.D. at 171. Plaintiffs in Weiss were relying on the decision of the Court of Appeals for the First Circuit in Moses v. Burgin, 445 F. 2d 369, Cert. denied, 404 U.S. 994, 92 S.Ct. 532, 30 L. Ed. 2d 547 (1971), and the trial court was concerned with developing the facts necessary to establish liability under that case:

> We must remember that in Moses v. Burgin, supra, the Court was laying down for the first time the key factors in determining liability. Since, in this case, it is possible that the keys may be found, the search should be made." 55 F.R.D. at 171 (Emphasis added).

The concerns in Weiss are not relevant here.

The case which is most relevant to the considerations supporting the approval of the present settlement is City of Detroit v. Grinnell, supra. While Exxon persists in alluding to cases where a trial court supposedly refused to hold an evidentiary hearing, it should be clear that Exxon's dissatisfaction with the hearing held by the court below is the result of Exxon's own failure to present any evidence other than the financial statements which were already before the court. Exxon, in other words, is seeking to attribute its own shortcomings to the trial court. Any information needed by Exxon, in the words of this Court in Grinnell, "could have come to the attention of appellant's counsel if he had expended the necessary effort." 495 F.2d at 463. The question is

"whether or not the district court had before it sufficient facts intelligently to approve the settlement offer. If it did, then there is no reason to hold an additional hearing in the settlement or to give appellants authority to renew discovery." 495 F.2d at 463. There is no doubt that the court below did have sufficient facts. As was said in Flinn v. F.M.C.Corp., supra:

> While it [the district court] should extend to any objector to the settlement "leave to be heard, to examine witnesses and to submit evidence" on the fairness of the settlement, it is entirely in order for the trial court to limit its proceedings to whatever is necessary to aid it in reaching an informed, just and reasoned decision. 528 F.2d at 1173.

Despite Exxon's persistent assertions to the contrary, it should be clearly understood that the trial court did extend to Exxon "leave to be heard, to examine the witnesses and to submit evidence" on the fairness of the settlement.

Exxon's role in objecting to the proposed settlement is best described in the following words from Grinnell:

> In general the position taken by the objectors is that by merely objecting, they are entitled to stop the settlement in its tracks, without demonstrating any factual basis for their objections, and to force the parties to expend large amounts of time, money and effort to answer their rhetorical questions, notwithstanding the copious discovery available from years of prior litigation and extensive pre-trial proceedings. To allow the objectors to disrupt the settlement on the basis of nothing more than their unsupported suppositions would completely thwart the settlement process. On their theory no class action would ever be settled, so long as there was at least a single lawyer around who would like to replace

> counsel for the class and start the case anew. To permit the objectors to manipulate the distribution of the burden of proof to achieve such an end would be to permit too much. 495 F.2d at 464.

A. The Evidentiary Record Fully Supports the Propriety of the Ilco Settlement.

Contrary to Exxon's claims, the evidentiary record is not "devoid of support for the compromise of the classes' claims for $85,000" (Exxon Brief, page 23), and does contain sufficient support for the court's approval. At the hearing and in its brief, Exxon chose to ignore the undisputed facts contained in the affidavit of the secretary of Ilco, Henry B. Dewey, that

* * *

> 4. Substantially all of Ilco's assets have been pledged.
>
> 5. The Company's Board of Directors has authorized the closing of Ilco's main plant in Fitchburg. Ilco has terminated its architectural hardware business except for the temporary supplying of replacement parts.
>
> 6. Ilco's collective bargaining agreement with the international Union of Electrical, Radio and Machine Workers, A.F.L. - CIO Local 290, expires on June 30, 1976, and Ilco has given notice to the Union that the Fitchburg plant is being closed. There are presently approximately 80 working employees in the bargaining unit and 20 non-bargaining unit employees.
>
> 7. Ilco presently owes its attorneys, Bowditch & Lane, Worcester, Massachusetts, in excess of $70,000 for legal services rendered. (A. 964).

Also undisputed are the facts contained in the certified financial statements, the authenticity of which is not

challenged by Exxon, which form the basis for the court's decision and which chart a history of loss upon loss. There is simply no merit to the assertion by Exxon that there is no factual basis for the trial court's decision. It is clear from reading Exxon's brief that Exxon is more concerned with what Ilco's financial statements say about Unican than what they say about Ilco.

Exxon's argument at page 23 of its brief that there is an "evidentiary void in the record" is based solely on a series of misstatements which Exxon makes about the Peat, Marwick & Mitchell financial statements and opinion letters, for example, that the Peat, Marwick letter states that the financial statements indicate "less than 'arms length'" transactions and that "Peat, Marwick declined to endorse Ilco's financial statements as fairly representing its financial condition." Ilco submits that the November 12, 1975 opinion letter from Peat, Marwick, when fairly read in its entirety, raises no "questions" militating against the approval of the settlement. The letter is set forth below in its entirety:

> The Board of Directors and Stockholders
> Ilco Corporation
> (a majority-owned subsidiary of Unican Security Systems, Ltd.):
>
> We have examined the consolidated balance sheets of Ilco Corporation and subsidiaries as of June 30, 1975 and 1974, and the related consolidated statements of earnings (loss) and accumulated deficit and changes in financial position for the years then ended. Our examination was made in accordance with generally accepted auditing standards, and accordingly included such tests of the accounting records and such other auditing procedures as we considered necessary in the circumstances.

> The Company is currently a defendant in law suits described in note 3(a); the final outcome of these suits is not presently determinable and no provision has been made in the financial statements for the effect, if any, of such litigation.
>
> During the year ended June 30, 1975 the Company's parent established certain policies with respect to transactions between the Company and its affiliate in Rocky Mount, North Carolina, as more fully explained in note 2. Such policies may have resulted in prices different from those which may have been realized if such transactions had been conducted at arms length with non-affiliated parties.
>
> In our opinion, subject to the final outcome of the litigation referred to in the second preceding paragraph, and except for the effect, if any, in 1975 of related party transactions referred to in the preceding paragraph, the aforementioned consolidated financial statements presently fairly the financial position of Ilco Corporation and subsidiaries at June 30, 1975 and 1974, and the results of their operations and changes in their financial position for the years then ended, in conformity with generally accepted accounting principles applied on a consistent basis.
>
> PEAT, MARWICK & MITCHELL & COMPANY
>
> November 12, 1975

Both the letter and the notes referred to at pages 23-25 of Exxon's brief refer to transactions between Ilco and its affiliates, not between Ilco and Unican. Nowhere does Peat, Marwick state that the transactions between Ilco and such affiliated companies were conducted at "less" than arms length. The word "less" is an adjective used liberally and loosely by Exxon. In addition, it is not true that Peat, Marwick "declined to endorse Ilco's financial statements as fairly representing its financial condition." (Exxon Brief, page 23). The letter states that "the aforementioned consolidated financial

statements present fairly the financial position of Ilco Corporation and subsidiaries" "except for the effect, if any, in 1975 of related party transactions..." and the litigation referred to in the second paragraph. (Emphasis added). This is a far cry from refusing to "endorse the accuracy of these statements" as Exxon characterizes Peat, Marwick's statement at page 43 of its brief.

The 12 paragraphs set forth on pages 23-25 of Exxon's brief, which appear to be an itemization of notes from the financial statements, are in fact extracted from only three notes, do not contradict the evidence of Ilco's failing financial condition and certainly do not indicate a fraudulent denuding of assets. Indeed, the notes which Exxon carefully does not cite make clear that Ilco was engaged in a vigorous effort to reduce its corporate debt to creditors such as the First National Bank of Boston and the Massachusetts Business Development Corporation. (See Note (5), A. 766).

Unfounded "suspicions" in the mind of Exxon, based on a selective recitation of half-information, should not be sufficient to sustain a charge that a district court abused its discretion in approving a settlement based on fully disclosed and legitimate financial data. The real thrust of Exxon's argument is not that the record before the court does not support the conclusion as to Ilco's financial condition. The real thrust of Exxon's argument is a desperate claim that Unican should be substituted for Ilco in the settlement of

the Master Key litigation. As will be seen below, Exxon has demonstrated no reason why Unican could or should be legally compelled to do so.

B. Exxon has failed to Demonstrate that the Corporate Separateness of Ilco and Unican should be Ignored.

Nothing in the record before the District Court or this Court or in Exxon's brief suggests that the general rule of law that a parent is not liable for the debts or acts of its subsidiary is not applicable to the present case. Exxon's attempt to make that argument is founded on an amalgam of quotations out of context, misleading statements and inapplicable cases. Exxon tries to shift the burden to Ilco to prove that Unican is not liable - in effect, to prove the negative - rather than itself affirmatively carrying the burden of presenting facts to show that Unican is liable.

For example, Exxon attempts to divert attention from the undisputed facts contained in the financial statements by misplaced emphasis on the fact that the secretary of Ilco Corporation is the law partner of Ilco's counsel and by a misrepresentative reference to financial statements of Unican Security Systems, Ltd., Ilco's parent. The fact remains that the sworn statement of the Dewey affidavit that the "agreement for the purchase of Ilco stock by Unican did not provide for the assumption by Unican of any debts or liabilities of Ilco" (A. 964) is undisputed. The assertion at page 45 of Exxon's

brief that Unican may have agreed to pay the debts of Ilco on a selective basis is simply not supported by mere reference to Note 3 to Unican's consolidated financial statements for the year ending June 30, 1972 filed with the Securities and Exchange Commission. The issuance of the 75,000 shares of common stock referred to in that note was but one part of a larger transaction involving three other corporations.

While reluctant to refer to matters outside the record, Ilco feels obliged to bring to this Court's attention, for the sake of clarity and understanding, the following matters which Ilco could not have anticipated would be necessary or useful to a consideration of the settlement and which, therefore, are not set out in detail in the record. On January 27, 1972 Ilco issued a $300,000 note to Cole National Corporation. On that same date Cole National Corporation endorsed the note over to Exeter International Corporation. Exeter thereupon endorsed the note over to Unican Securities Systems in return for the 75,000 shares of common stock of Ilco. At the same time Unican invested $1,025,000 in Ilco for common stock and loaned Ilco $175,000 under a promissory note. Also at the same time, Ilco, which owed Cole National Corporation $3,417,073 on a promissory note, paid Cole $1,167,000 in cash and issued to Cole the $300,000 note referred to above and a $500,000 note. At this time Cole National Corporation endorsed the $800,000 of notes to Exeter International Corporation and Exeter used the $300,000 note to purchase the 75,000 shares of Unican. Ilco has been paying on the $500,000

note as the payments become due thereunder. (A.779). Thus for a total of $1,967,000 in cash and notes payable, Ilco managed to cancel a note of $3,417,073 payable to Cole National. Furthermore, Ilco has prepaid the $300,000 note to Unican. (A. 779). Thus, Unican merely substituted itself for Cole National Corporation as a creditor of Ilco. The foregoing was all part of the transactions comprising Unican's acquisition of Ilco and would have been explained to Exxon had it bothered to ask.

In another blatant quotation out of context Exxon attempts to have this Court believe that the disclosure of the existence of the Master Key Litigation on Unican's consolidated financial statements indicates that Unican considers itself, as opposed to its subsidiary Ilco, responsible for any liabilities arising out of the lawsuit. This suggestion is patently illogical and is too great a leap to be taken seriously. In addition, Ilco suggests that Exxon has deliberately tried to mislead this Court by not quoting the entire note which reads as follows:

> 6. Litigation:
>
> During 1970 and 1971 Ilco Corporation, a subsidiary, was named in a number of class actions against manufacturers of lock hardware alleging violations of antitrust laws. These actions were brought in various jurisdictions and have been consolidated for pretrial proceedings in the United States District Court for the District of Connecticut. During fiscal 1975 this subsidiary was named a defendant in a number of cases brought by union employees through the American

> Arbitration Association. The total amount claimed approximates $207,000. In addition the National Labor Relations Board issued a consolidated complaint involving a number of alleged unfair labor practices; no dollar amount has been claimed. Legal counsel is unable to assess whether any of these actions have merit and the company and counsel are unable to determine what damages, if any, may result from these actions. (Emphasis added).8/

Exxon's attempt to convert legitimate disclosures into admissions of liability and, even more, assumptions of liability, is preposterous.

Exxon's argument in support of its claim that Unican is liable for the debts of Ilco goes too far. Exxon raises the question but does not provide a satisfactory answer to why Unican, when it acquired the stock of Ilco, would have acquired knowingly and deliberately an uncertain but potentially substantial antitrust liability. Exxon asserts as an "undeniable fact" that "in 1972 Unican purchased a profitable, going concern with substantial liquid and physical assets and profit potential . . . . " (Exxon Brief, page 46). While Exxon's research outside of the record with regard to Ilco's and Unican's financial statements is impressive and commendable, more diligence on Exxon's part would have discovered the following unreported decision of the United States District Court for the District of Massachusetts, Wyzanski, D.J., in Alfred Zion, et al.v. Sidney V. Saginor, et al. (D.Mass. Civil Action No. 72-40 W, January 5, 1972), affirmed in Zion v. Saginor (1st Cir., No. 72-1029, May 31, 1972).

8/ Notes to Consolidated Financial Statements, June 30, 1975, Unican Security Systems, Ltd., p. 11.

The court's findings, made after a plenary hearing on a motion for a preliminary injunction brought by a class of shareholders of Keil Lock Company, then an Ilco subsidiary, alleging the conversion of Keil assets by its parent Ilco, provide instructive commentary on Exxon's unfounded assertions:

> The situation of ILCO is quite different. For some time it has had a mammoth loan given to it under joint arrangements with the First National City Bank of New York, and to the extent of one-ninth of the money involved Worcester County National Bank. The amount now due, apart from interest, from ILCO to these two banks is about 4 and a half million dollars. Worcester County National Bank's interest is in the neighborhood of $390,000. The loan agreement with these two banks involves what the parties colloquially call a springing lien under which the banks have a right on 20 days notice if there has been a failure to perform the conditions of the loan agreement to take over the assets of ILCO.
>
> As part of the assets covered by the Loan agreement ILCO has included the common stock it owns in Keil.
>
> Constant surveillance by authorized and competent officers of the two banks has made them familiar with the fiscal situation of both corporations. Both

corporations have been teetering on the edge of bankruptcy. Indeed, the Bridgeport Brass Company one of the creditors of the corporation, has at times seemed on the edge of taking actions which would result either in a Chapter 11 bankruptcy proceeding or in even more disastrous liquidation.

The banks have been nursing the situation in the hope that somebody would come along to buy into this not very inviting prospect.

Recently a Canadien corporation, referred to as Unican, has shown some interest and has begun on a serious basis negotiations which might ripen into a complete agreement within the next few weeks if this Court allows the negotiations to continue unimpeded. In this proposed arrangement Worcester County National Bank would sweeten the picture by adding some new funds of a minor kind increasing the principal of its commitment from $390,000 to perhaps $500,000. More significantly Massachusetts Business Development Corporation has shown an interest. That corporation is primarily interested in what I loosely previously referred to as more than 100 employees in Fitchburg. There are in fact nearer 700. The Massachusetts Business Development Corporation is a public enterprise serving a function analogous to that which the RFC performed in its heyday.

It might be that Massachusetts Business Development Corporation would lend as much as a million dollars to ILCO provided that Unican actually came into the picture, that additional capital was supplied, and there was a closing down of the Charleston, N.H. operation heretofore carried on by Keil. Unless Keil as an operating unit disappeared it is highly unlikely that Massachusetts Business Development Corporation would put in new money.

Absent the rescue operations which are contemplated it seems to this Court evident that both corporations will drown and carry with them all the common and preferred stockholders, and that there is a very small chance that even creditors will save much. Furthermore, the 700 employees in Fitchburg, Massachusetts are likely to be left unemployed . . . .

What we have here is a company, Keil, which at least in the period of time covered by the testimony has been insolvent in the bankruptcy as well as in the equity sense, and which has depended entirely upon such infusions of capital and money for current expenses as came from the parent company ILCO, which in turn derived funds from banks which at any moment might have considered the possibility of throwing the ILCO Corporation into bankruptcy.

> Far from being of the view that the individual defendants or the banks or others have in any way acted to the prejudice either of Keil or ILCO, this Court is fully satisfied that a prudent and indeed admirable course of conduct had been followed. The true choice presented is whether to give Unican, Massachusetts Business Development Corporation, Worcester County National Bank, First National City Bank of New York, and the officers and directors of the two corporations here involved, a chance to see if they can effect a rescue or whether to send this whole consolidated operation into the merciless hands of the Bankruptcy Court where it is certain that, save in an unforeseeably generous moment, the creditors will not allow a penny to the preferred stockholders of Keil. Indeed, any attempt to give the preferred stockholders anything would probably be unconstitutional absent assent by the creditors for the rule now established as to fair and just distribution of insolvent estates does not allow holders of equity interests to receive anything until creditors are paid in full or assent to a diminution of their rights.

In the light of this record and the dismal history of Ilco reflected in its financial statements, it is clear that the acquisition of Ilco by Unican is nothing more sinister than a

legitimate business venture that did not work out as hoped.

The cases cited at pages 46 and 47 of Exxon's brief, in which various courts have "pierced the corporate veil" and found a parent corporation liable for the activities of its subsidiary, are so distinguishable on their facts from the present case that they are of no help whatever to Exxon's argument. In United States v. Van Raalte Company, 328 F. Supp. 827 (S.D.N.Y. 1921), the subsidiary defendant was merged into an operating division of the parent corporation after commencement of various suits by the government. The court there held that denuding the assets of the subsidiary defendant by merger into the parent corporation does not give the transferee immunity. Moreover, the Van Raalte Company moved, with the consent of the government, to have itself substituted as the corporate defendant. In Hoche Productions v. Jayark Films Corporation, 256 F. Supp. 291 (S.D.N.Y. 1966), where the court also found that the parent corporation was liable for the activities of the subsidiaries, the comptroller of the parent corporation testified in an affidavit that the parent corporation had assumed the liabilities of the dissolved subsidiary. Moreover, applicable New York law provided that the surviving corporation assumes the liabilities of the predecessor corporation.

Similarly, Bernardin v. Midland Oil Corporation, 520 F. 2d 771 (7th Cir. 1975), is distinguishable on its facts. In

Bernardin, the court applied the "mere instrumentality" test ennunciated in Steven v. Roscoe Turner Aeronautical Corporation, 324 F. 2d 157 (7th Cir. 1973), and found that the subsidiary and the controlling parent corporation were one and the same entity. However, this finding was predicated upon evidence adduced at trial that Midland had impliedly assumed the obligation of the subsidiary by agreeing to make semi-monthly payments to Bernardin until the account giving rise to the action was paid in full, directing one of its own (Midland's) officers to liquidate the subsidiary, and paying the cash received on liquidation to the subsidiary's other creditors. The court found on these facts that:

> [T]o permit Midland to escape Zestee's [the subsidiary's] creditors by retaining Zestee as a shell would clearly be inequitable and unjust. Bernardin, supra, at 775.

In the present case at bar, Exxon has not offered any evidence that Ilco is a mere shell or that there is, or was, any such relationship between Ilco and Unican. In fact, as the excerpt from Zion v. Saginor, supra, indicates, just the opposite is true: without the intervention of Unican Ilco would have been a shell at best, bankrupt at worst.

Exxon's reliance on Knapp v. North American Rockwell Corporation, 506 F. 2d 361 (3rd Cir. 1974) is also misplaced. In Knapp, the subsidiary (TMW, the manufacturer of the allegedly defective machine) exchanged substantially all of its assets for stock in North American Rockwell. The stock acquired by

the subsidiary was to be distributed to its shareholders and TMW was to be dissolved "as soon as practicable after the last of such distributions." 506 F. 2d at 363. The TMW entity was retained until February 20, 1970, almost 18 months after the transfer of the bulk of the assets to North American Rockwell. The court found that, despite the continuing existence of the shell of TMW, a merger in fact had taken place, due to, among other things, the brevity of the corporation's (TMW's) continued life, and public policy dictated that an injured claimant be provided his day in court. Moreover, by Pennsylvania statute (15 P.S. §1907) the surviving corporation becomes liable for the obligations of the corporation which ceases to exist. 506 F. 2d at 367.

Not only do these cases not lend support to Exxon's argument, but the very evidence that Exxon claims "weighs heavily against approval of the settlement" (Exxon Brief, page 23) - the financial statements themselves - lends support to the corporate distinctness of Unican and Ilco. The very detailed and complete disclosure of transactions and the careful dilineation of the roles played by Unican, Ilco and Ilco's subsidiaries militate against a finding that there has been

> ...a confused intermingling of activity of two or more corporations engaged in a common enterprise with substantial disregard of the separate nature of the corporate entities or serious ambiguity about the manner and capacity in which the various corporations and their

respective representatives are acting. My Bread Baking Co. v. Cumberland Farms, Inc., 353 Mass. 614,619 (1968).

Such intermingling or ambiguity is of course one of the factors which might "permit the conclusion that an agency or similar relationship exists between the parties." Id.

Another variation of the rule found in the My Bread case also supports the conclusion that Unican and Ilco are, and should be treated as, separate and distinct corporate entities:

> Where there is common control of a group of separate corporations engaged in a single enterprise, failure (a) to make clear which corporation is taking action in a particular situation and the nature and extent of that action, or (b) to observe with care the formal barriers between the corporations with a proper segregation of their separate businesses [Citation omitted], records and finances, may warrant some disregard of the separate entities in rare particular situations in order to prevent gross inequity. 353 Mass. at 620. (Emphasis added).

There is simply no evidence in the present case of such circumstances. Indeed, the only evidence there is - the financial statements - proves that the separate entities have not been, and so should not be, disregarded.

CONCLUSION

For all of the foregoing reasons, the District Court's

approval of the Ilco settlement and entry of judgment dismissing Ilco with prejudice should be affirmed.

Respectfully submitted,

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August 24, 1976

Office of the Clerk
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
United States Courthouse
Foley Square
New York, New York 10007

In re: Master Key Antitrust Litigation
Docket No. 76-7356 and 76-7379

Dear Sir:

Enclosed for filing please find ten (10) copies of the Brief for Defendant-Appellee Ilco Corporation in the above-entitled matter.

I hereby certify that I have served two copies of said Brief on the following counsel by mailing same first-class mail, postage prepaid, this 24th day of August, 1976:

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Thank you for your assistance in this matter.

Very truly yours,

James E. Wallace, Jr.
Attorney for Defendant-
Appellee Ilco Corporation

cc: Above-named counsel